8-8-2008

Vreeken v. Lockwood Engineering, B.V. Appellant's Reply Brief Dckt. 34817

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTIANNE VREEKEN,

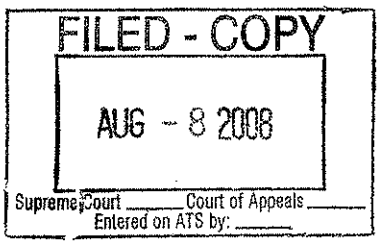
Plaintiff,

vs.

LOCKWOOD ENGINEERING, B.V., et. ux.

Defendants.

Supreme Court Case No. 34817



THOMAS R. GOLD, an individual,

Crossclaimant-Respondent,

vs.

LOCKWOOD ENGINEERING, B.V., a Netherlands corporation, GERGBROEDERS MEIJER BELEGGING, B.V., a Netherlands corporation, a/k/a GERBROEDERS MEIJER BELEGGING, B.V.; and JAN VREEKEN an individual,

Crossdefendants-Appellants.

THOMAS R. GOLD, an individual, RICHARD L. GOLD, an individual, and TOMAC PACKAGING, INC., a Massachusetts corporation,

Crossclaimants and Third Party Plaintiffs-Respondents

vs.

LOCKWOOD PACKAGING CORPORATION, a Delaware corporation ("LPC"); and LOCKWOOD PACKAGING CORPORATION IDAHO, an Idaho corporation ("LPC Idaho")

Third Party Defendants-Appellants.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.
Honorable, Jon J. Shindurling, District Judge, presiding.

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ARGUMENT

A. The District Court erred as a matter of law in granting partial summary judgment dismissing Appellants' cross-claims of fraud, misrepresentation and breach of covenant of good faith and fair dealing.

As noted in the Appellants' Brief, to prevail on appeal in review of district court's summary judgment, the Appellants need only to prove a triable issue of fact. *Country Cove Development, Inc. v. May,* 143 Idaho 595, 150 P.3d 288 (2006).

Some glaring examples of apparent issues concerning Tom Gold's representations of financial solvency are found in the Management Letter dated August 10, 1999 prepared by Vreeken's agents – including Jack Schipper, who examined LP's records. (*Clerk's Record*, Vol. V, pp. 893-904). In paragraph Ad 2 its states, "Completeness of quotations and order confirmations can't be verified because of the system in use." Paragraph Ad 3 illustrates inadequate management – Tom Gold was the manager – of LP and LPI, including lack of monitoring of account receivable. The concluding sentence sums up the concern, "Therefore we are unable to say anything about the correctness of the accounts receivable." When Vreeken's agents requested permission from Tom Gold to contact debtors, Tom reportedly "was less than enthusiastic about this idea and *he told us that this check was already done*...." *Clerk's Record*, Vol. V, p. 900, paragraph Ad 4.).

Regarding inventory information, Vreeken's agents stated, "As of the start of our visit to the USA we've asked fro correct inventory figures including locations but till now we've not received this information yet. We are of the opinion that we will never have the answer." (*Clerk's Record*, Vol. V, p. 900, paragraph Ad 8.). Vreeken echoed the findings of his agents as part of the impetus to dissolve the joint venture. (*Clerk's Record*, Vol. V, pp. 905-908).

Another distressing fact was the extraordinary increase in debt taken on by LPI prior to the parties finalizing the MOU. In December 1997 LPI obtained a $50,000 line of credit at the Bank of Idaho. By May 2000 – a mere 29 months, that line of credit had ballooned to $850,000. All of that increase came at a time when Tom Gold was managing the company, failing to monitor accounts receivable, and representing to Vreeken's agents that monitoring of debtors was taking place.

Finally, as part of the MOU, the Golds were to deliver to Vreeken a list of all current debts and creditors of LPI. (*Clerk's Record*, Vol. I, pp. 218-228). The Golds delivered only a partial list. (*Transcript* Vol. II, p. 100-104).

Due to the absolute paucity of tangible evidence on which Vreeken could rely to determine the financial status of LP and LPI, Vreeken had to rely upon Tom Gold's representations about accounts receivable, customers, creditors, and all other material aspects of the intended buy-out agreement.

Reasonable minds could differ on whether Vreeken had the right to rely upon Tom Gold's representations. Vreeken entered into the MOU with a reliance on Tom Gold's good faith and representations that LP and LPI were financially solvent; there were no accurate accounting records on which Vreeken could otherwise place any reliance.

The district court too quickly shot down Vreeken's claims of misrepresentation, fraud and breach of the covenant of good faith and fair dealing without considering all the evidence and inferences supporting those claims. Vreeken submits there were triable issues of fact on his claim of misrepresentation. The district court's decision dismissing the remaining claims was in error.

B. The MOU did not impose a duty on Vreeken to indemnify Richard Gold on the Citizens Bank loan.

"The interpretation of a contract [also] presents a question of law for the court, except to the extent disputed facts bear upon such interpretation. The object of the court is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose." *USM Corp.* v. *Arthur D. Little Sys., Inc.*, 28 Mass. App. Ct. 108, 116 (1989).

Under Massachusetts law, the interpretation of an indemnification clause turns on the "expectations and intentions of the parties, at the time of agreement, with regard to the future effect of [the clause]." *Feakes* v. *Bozyczko*, 373 Mass. 633, 636 (1977). The basic rule for interpreting an indemnification clause in a contract is giving "effect to the parties' intentions and construe the language to give it reasonable meaning wherever possible." *Shea* v. *Bay State Gas Co.*, 383 Mass. 218, 224-225 (1981).

Both parties concede the language in the MOU is unambiguous.

Section 2(c) of the MOU sets forth in plain language a limited and contingent right to indemnification. For example, in pertinent part the MOU states, "If necessary to effect such releases, Vreeken agrees to personally guarantee such loans." And, the Golds were given the option of terminating the MOU if the Lockwood Entities failed to provide releases "unless Vreeken shall expressly opt to indemnify [the Golds]...." (*Clerk's Record*, Vol. I, p. 165).

There is no language in the pertinent portion of the MOU on which the district court could properly construe that Vreeken had an absolute duty to indemnify Richard Gold. The quoted language manifestly establishes that Vreeken alone had the option to indemnify Richard Gold. Indeed, if Richard Gold was unsatisfied with the absence of releases from the Lockwood Entities, he had the right to terminate the MOU. A right he most certainly did not assert.

Construing the indemnification language of the MOU consistent with Massachusetts' law, there plain meaning of the language used gives understanding that the parties intended any indemnification would be contingent on Vreeken exercising an option to indemnify in order to avoid termination of the MOU and not absolute as the district court concluded.

Where there is no facts and law supporting the district court's decision, this Court must find the district court erred in granting summary judgment declaring Vreeken was obligated to indemnify Richard Gold.

C. The MOU did not impose a duty on Jan Vreeken to indemnify Thomas Gold on the EIEDC loan.

"The interpretation of a contract [also] presents a question of law for the court, except to the extent disputed facts bear upon such interpretation. The object of the court is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose." *USM Corp.* v. *Arthur D. Little Sys., Inc.*, 28 Mass. App. Ct. 108, 116 (1989).

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Where there is no facts and law supporting the district court's decision, this Court must find the district court erred in granting summary judgment declaring Vreeken was obligated to indemnify Thomas Gold.

D. The issue of personal jurisdiction may be raised for the first time on appeal.

The Respondents contend the Appellants waived any issue concerning personal jurisdiction by failing to bring the issue before the district court. Continuing, the Respondents claim the record on appeal must contain an adverse ruling to form the basis for assignment of error and, absent such a ruling, the issue is not preserved for appeal. (*Respondents Brief*, p. 26).

"A question of jurisdiction is fundamental; it cannot be ignored when brought to our attention and should be addressed prior to considering the merits of an appeal." *H & V*

Engineering, Inc. v. Idaho State Board of Professional Engineers and Land Surveyors, 113 Idaho 646, 648; 747 P.2d 55, 57 (1988).

"Even if jurisdictional questions are not raised by the parties, we are obligated to address them, when applicable, on our own initiative. Further, parties cannot confer jurisdiction upon the court by stipulation, agreement, or estoppel. Questions of jurisdiction must be addressed prior to reaching the merits of an appeal. *Bach v. Miller,* 144 Idaho 142, 145, 158 P.3d 305, 308 (2007)(citations omitted). Questions of personal jurisdiction are issues of law over which the appellate court will exercise free review. *Id.*

In *Bach*, no issue of personal jurisdiction was raised in the district court. On appeal, the question of jurisdiction was ruled upon for the first time even though the issue had not previously been presented to the district court. The appellate record contained no adverse ruling on jurisdiction. Absence of an adverse ruling did not prevent the appellate court from considering the issue on appeal. Consequently, issues of both subject matter jurisdiction and personal jurisdiction may be presented at any time because jurisdiction controls the authority of a court to render judgment.

Proper service on a party is prerequisite to exercise of personal jurisdiction over that party. Where Vreeken, a Dutch citizen, and Lockwood Engineering and Gerbroeders Belegging, Dutch corporations, were not served in accordance with the Hague Convention, Idaho courts could not exercise personal jurisdiction over those persons.

Consequently, the district court lacked personal jurisdiction over Vreeken, Lockwood Engineering, and Gerbroeders Belegging.

E. The District Court acknowledged the Appellants' amendment of pleadings at the close of trial but failed to rule upon the issue of breach of fiduciary duty.

The Respondents argue that the issue of breach of fiduciary duty was not tried as part of the court trial and that the court did not rule upon the Appellants' closing motion to amend pleadings to conform to the evidence. The Respondents ignore the following plain facts.

During the course of the trial, the Appellants specifically raised the issue of Thomas Gold's breach of fiduciary duty to Vreeken. Direct evidence was presented establishing that Vreeken through Lockwood Holdings provided financial support to LP and LPI. (*Transcript,* Vol. II, pp. 94-97). The amount of Vreeken's financial support totaled 2.15 million dollars. (*Transcript*, Vol. II, p. 141). Finally, evidence presented at trial, including Thomas Gold's testimony, proved that he had represented to Vreeken that Vreeken's investments would be secured through security interests in the assets and equipment of LP and LPI. (*Transcript* Vol. II, pp. 96-98; *Augment Transcript*, pp. 115-116). The Golds knew of Vreeken's significant financial contributions toward the business enterprises. *Transcript*, Vol. II, p. 96, ll. 21-25, p. 97, ll. 125, p. 98, ll. 1-23; p. 138, ll. 1- 13; *Augmented Transcript*). Thomas Gold promised Vreeken his contributions would be secured. (*Transcript*, Vol. II, p. 96, ll. 21-25, p. 97, ll. 125, p. 98, ll. 1-23; p. 138, ll. 1- 13; *Augmented Transcript*).

Vreeken testified without objection from the Golds that he believed Thomas Gold had breached his fiduciary duty. (*Transcript* Vol. II, pp. 120-121). During cross-examination of Vreeken, counsel for the Golds specifically asked questions relating to Thomas Gold's agreement to protect Vreeken's investments through security interests. (*Transcript* Vol. II, pp. 133-135).

Accordingly, at the close of trial and prior to resting the Appellants' case, a motion was made to conform the pleadings to the evidence. (*Transcript* Vol. II, p. 143, lines 12-14). The district court acknowledged and granted that motion. (*Transcript* Vol. II, p. 143, line 15).

"When issues are not raised by the pleadings, the evidence raising the legal issue must be clear enough so that both parties know of the issue and consent to the issue being tried." *Ross v. Coleman Co., Inc.,* 114 Idaho 817, 827, 761 P.2d 1169, 1179 (1988). While trial of an issue by consent is not established merely because evidence relevant to that issue was introduced; where such evidence presented at trial supported solely the unpleaded theory and was irrelevant to other issues or claims, consent to try the issue should be found. *M.K. Transport, Inc. v. Grover,* 101 Idaho 345, 349-50, 612 P.2d 1192, 1196-97 (1980); *Mountain Restaurant Corp. v. ParkCenter Mall Assoc.,* 122 Idaho 261, 268, 833 P.2d 119, 126 (Ct. App. 1992).

At the time of trial, all of the Appellants claims had been dismissed through summary judgment. Evidence of Thomas Gold's beach of fiduciary duty and the cost to Vreeken resulting from such breach was irrelevant to any remaining claim or issue in the Respondents' pleadings. Such evidence was only relevant to the issue of breach of fiduciary duty.

Unquestionably, the issue of breach of fiduciary duty was tried to the court. Nevertheless, the court erroneously failed to decide that issue and render judgment upon the evidence presented.

F. Admission of hearsay evidence was error.

Hearsay evidence was offered through Thomas Gold on the premise that it constituted a statement by a co-conspirator. (*Augmented Transcript*, pp. 41-42). Objection was timely raised to such evidence. (*Augmented Transcript*, pp. 44-46). After considering predicate questions for

foundation, the court determined the hearsay evidence was admissible under 801(d)(2), concluding Christianne Vreeken acted as an agent of Vreeken in securing the assignment of the Bank of Idaho position. (*Augmented Transcript*, pp. 47-48).

Under I.R.E. 801(d)(2)(D), statements offered against a party are not hearsay if they are made "by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship."

> We have found no Idaho decision specifically addressing the type of foundational evidence of agency that is required for admission of evidence under I.R.E. 801(d)(2)(D), but decisions preceding adoption of the Idaho Rules of Evidence hold that independent evidence of the agency relationship, i.e., evidence apart from the alleged agent's own statements, are necessary before the alleged agent's out-of-court declarations may be admitted. [Citations omitted]. Although all of the foregoing decisions were rendered before adoption of the Idaho Rules of Evidence, in our view the same principal [declarations of an alleged agent, standing alone, are insufficient to prove that he has been granted the power to act for the alleged principal] should apply to evidence proffered under I.R.E. 801(d)(2)(D) as an admission by an agent of a party opponent."

R Homes Corp. v. Herr, 142 Idaho 87, 92, 123 P.3d 720, 725 (Ct. App. 2005).

Noticeably absent in the predicate questions was any independent evidence that Christianne Vreeken was an agent or servant of her father; that she was acting within the scope of such agency; and that she made a statement during the existence of an agency relationship. Thomas Gold's testimony merely stated that Christianne did not know what she was signing when obtaining the assignment from the Bank of Idaho and that she wanted out of the litigation. He added that Christianne said her father wanted her to take the assignment for leverage on against the Golds. (*Augmented Transcript*, pp. 46-47).

Christianne's alleged statements alone are insufficient foundation to prove she was granted power to act and speak for Vreeken. Absent predicate independent evidence establishing the agency relationship, the hearsay statements were inadmissible.

CONCLUSION

The district court's partial summary judgment entered May 3, 2005, amended partial summary judgment entered September 2, and partial summary judgment entered November 8, 2006 should be vacated. This action should be remanded for trial on those claims and issues.

The district court's Final Judgment entered October 5, 2007 should be reversed. The action should be remanded for entry of judgment in favor of the Appellants and against the Golds, jointly and severally, on the claims of breach of fiduciary duty in the amount of 2.15 million dollars.

The district court's partial summary judgments and final judgment should be vacated for lack of personal jurisdiction over Vreeken, Lockwood Engineering, and Gerbroeders Belegging.

An award of the Appellant's costs and reasonable attorney fees on appeal should be entered.

Dated this 6 day of August 2008.

Kipp L. Manwaring
Attorney for the Appellants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the _____ day of August 2008, a true and correct copy of the foregoing document was served upon the person or persons named below in the manner indicated.

DOCUMENT SERVED: APPELLANTS' REPLY BRIEF

PARTIES SERVED:

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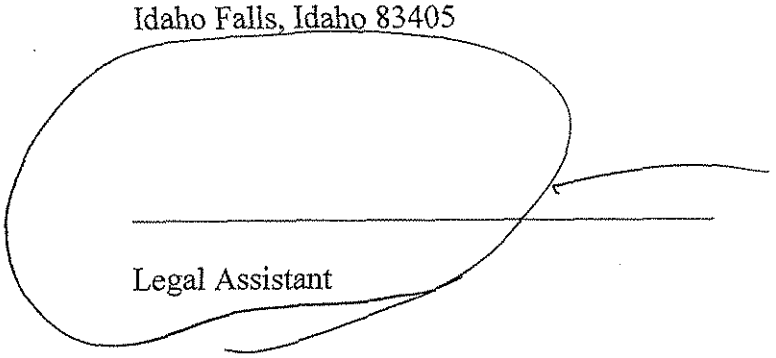

Legal Assistant